UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Yuk Sum Wong, on behalf of her child, Samantha Wong,	:	
Plaintiffs,	:	No. 1:15-CV-0417-RA
v.	:	
NEW YORK CITY DEPARTMENT OF EDUCATION and CARMEN FARIÑA, in her official capacity as Chancellor of the New York City Department of Education,	:	
Defendants.	:	

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' REPLY BRIEF

PRELIMINARY STATEMENT

The question before this Court is whether the New York City Department of Education ("DOE") provided Plaintiff Samantha Wong with a free and appropriate public education ("FAPE"). In this case, the DOE failed to carry its burden of proof that the Manhattan School for Career Development ("P751") would have provided the services mandated in Samantha's Individualized Educational Program ("IEP"). In short, Samantha is entitled to tuition reimbursement for the 2012-2013 school year because the requisite *Burlington-Carter* test has been met: (i) P751 could not meet Samantha's occupational therapy, speech therapy and academic needs; (ii) the Cooke Center for Learning ("Cooke") was an appropriate placement; and (iii) equitable considerations weigh in Samantha's favor. The decisions of the independent hearing officer ("IHO") and the state review officer ("SRO") are not supported by the administrative record, and respectfully, this Court should not simply defer to their conclusory analyses. Although federal courts cannot "substitute their own notions of sound educational policy for those of the school authorities which they review," a reviewing court cannot simply "rubber stamp administrative decisions." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). Here, the record indisputably shows that (i) P751 did not offer onsite occupational therapy; (ii) P751 lacked speech and language services; (iii) P751 focused primarily on vocational skills; and (iv) P751 could not provide the counseling services Samantha required. Taken together, this evidence indicates that the DOE failed to provide Samantha with a FAPE. Accordingly, Samantha respectfully requests that this Court grant her motion for summary judgment.

ARGUMENT

I. THE EDUCATIONAL PROGRAM RECOMMENDED BY THE DOE COULD NOT MEET SAMANTHA'S NEEDS

As explained below, the DOE cannot establish that P751 could satisfy Samantha's IEP. On this basis, the Court should grant Plaintiff's motion for summary judgment.

A. The Record Established That P751 Could Not Provide Samantha With The Occupational Therapy She Required

According to Samantha's IEP, she requires "occupational therapy to address functional independence, fine motor [skills] in relation to home and self care."[1] Despite this clear mandate, P751 had no onsite occupational therapist. Marci Kutschman, a special education teacher at P751, testified that absent an occupational therapist on staff, Samantha's therapy would need to be provided by the school district through an agency. In its opening brief, the DOE conceded that "P751 did not have an occupational therapist on staff."[2] Instead of receiving the services she needed onsite, Samantha would have been forced to go through the difficult related services authorization ("RSA") process. While using RSAs may be appropriate under some circumstances, it was not appropriate here. Like the student in *B.R. v. New York City Dep't of Educ.*, using RSAs in this case would have deprived Samantha of the services in her IEP. 910 F. Supp. 2d 670, 677 (S.D.N.Y. 2012). When Samantha and her family considered P751, the assistant principal candidly stated that the RSA process was "new," that he did not have any experience with them, and that P751 could not meet Samantha's IEP.[3] These admissions informed the Wongs' decision to reject P751 because it was incapable of providing the occupational therapy Samantha required.

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[1] *See* Ex. J.

[2] Defs. Br. at 19.

[3] Ex. I at 257:7.

Furthermore, requiring Samantha to travel to receive occupational therapy would have unduly burdened her. As noted in her IEP, Samantha had challenges traveling and needed practice using maps to recognize and identify subway routes.[4] In other words, to force Samantha to travel (an adaptive skill with which she struggled) was a completely unreasonable solution to Samantha's occupational therapy needs.

B. The Record Established That P751 Could Not Provide The Speech Therapy Samantha Required

The record established that P751 could not provide the speech therapy Samantha required. Defendants argue that P751 "integrated" vocational skills with Samantha's speech and other language needs. But this is insufficient to satisfy the requirements of her IEP, which mandated speech therapy three times per week for 45 minutes. Yet, at P751 there was only one speech teacher who served over 200 students, spread across 18 sites. Importantly, Sally Ord testified that this speech teacher "cannot service students at [Samantha's] site.[5] Instead, students were required to travel to the school's main location. This is more than "speculation," (as the DOE categorizes it), but the reality of P751. The IHO incorrectly concluded that "it was clear that had the child accepted placement at P751, she would have received her speech services." Given the above evidence, the IHO's conclusion is unreasonable and not supported by the administrative record.

Contrary to the DOE's position, focusing on vocational skills alone would not have advanced Samantha's speech and language needs. Samantha's disability requires particular care to the constituent parts of communication: academics, counseling, occupational therapy, and speech therapy. By assuming that she would achieve goals in one area (speech) because she was working toward vocational goals, the DOE undermines the purpose of the IDEA: to provide students with a FAPE that is built around their specific academic and developmental needs.

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[4] Ex. J at 3-7.

[5] Ex. I at 277:8-278:17.

C. The Record Established That P751 Was Too Vocationally Driven

To Samantha's academic detriment, P751 focused almost entirely on the development of vocational skills. With respect to academic instruction, Samantha's IEP repeatedly mentions the need for a multisensory approach to develop her math and reading skills. But according to Ms. Ord, academics were secondary to all else at P751. Specifically, Ms. Ord testified that academics were

> essentially **secondary to the actual main focus, which is the vocational skills on a day-to-day basis**. Within that 90 to 120-minute block that as we've spoken to the integration of related service would not take place in terms of supporting Sam's student skills. . . . **There would not be the integrated approach that would be appropriate for Sam to make academic gains**. In terms of access to materials and access to, for example computers and basically to the technical aspects of the education, for example, a smart board and technology, **which would enable a multi-sensory approach to academic instruction and are not . . . available**.[6]

Defendants attempt to minimize P751's obvious deficits by stating that "[g]iven the student's age (19), it was entirely appropriate for the student to spend **portions** of her day on vocational development and transitional skills, both of which would have advanced her education."[7] Out of a 7.5 hour day, spending 6 hours on vocational tasks certainly constitutes more than a "portion[]" of Samantha's day. With only 90 minutes of academic instruction per day, and without a

[6] Ex. I at 285:4-19 (emphasis added).

[7] (Defs. Br. at 24) (emphasis added).

multisensory approach (as required by her IEP), Samantha could not have met the reading and math benchmarks in her IEP.

In addition, according to Samantha's IEP, she is supposed to receive counseling two times a week for 45 minutes. However, when Samantha's family visited P751, no one discussed whether the school could provide the requisite counseling she needed.

II. COOKE IS AN APPROPRIATE PLACEMENT AND THE EQUITIES FAVOR SAMANTHA

Cooke was an appropriate placement for Samantha—her curricula at Cooke included small class sizes, adaptive skills, community interaction and counseling. Unlike P751, Cooke provided onsite occupational therapy, which she received twice a week. Moreover, her occupational therapist at Cooke collaborated each week with her other instructors to provide a truly integrated program.

Finally, the equities of this case certainly weigh in favor of the DOE funding Samantha's tuition for the 2012-2013 school year. The Wongs cooperated with the DOE at every during the placement process, provided notice of the unilateral private placement and as a result of their actions, Samantha has made significant progress at Cooke.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant her motion for summary judgment.

Dated: New York, New York,
July 7, 2016

Respectfully submitted,

/s/ Cherelle I. Glimp

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